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No. 98-1239

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AETNA FINANCE COMPANY,
D.B.A. ITT FINANCIAL SERVICES,

Petitioner,

v.

MILDRED WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The bulk of respondent's brief in opposition is a one-sided recitation of the purported facts of this case. *See* Opp. 1-10. While many of the statements made by respondent are wrong or misleading, petitioner ITT will not respond in detail to that discussion because it is entirely irrelevant to the two narrow questions presented: Whether the Ohio Supreme Court erred in adopting a rule prohibiting the enforcement of arbitration agreements contained in form contracts, and whether that court erred in sustaining the unconstitutionally excessive punitive damages award against ITT. *See* Pet. i. With respect to *those* questions—the only questions before this Court—respondent has entirely failed to rebut ITT's demonstration that a writ of certiorari is warranted to review the decision below.

1. Although this Court has repeatedly made clear that States cannot construct obstacles to the enforcement of contractual arbitration provisions (*e.g.*, *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996)), the decision below declares unenforceable arbitration provisions contained in consumer credit agreements and other "form" contracts. Pet. App. 12a-13a. As ITT has shown, that conclusion contravenes the Federal Arbitration Act and directly conflicts with numerous state and federal decisions. *See* Pet. 7-24. Respondent nevertheless contends that certiorari review is unnecessary because (a) the decision below is fact-bound; (b) the decision below is consistent with other cases; and (c) the federal question is not properly preserved. Opp. 10-17. Each contention is meritless.

a. Contrary to respondent's primary assertion, there is nothing "fact-specific" (Opp. 11) about the Ohio Supreme Court's decision. That court held, as a matter of law, that the arbitration provision was unenforceable solely because it was "contained in a consumer credit agreement with some aspects of an adhesion contract." Pet. App. 12a. Millions of such contracts are signed annually, enabling consumers to finance the purchase of appliances, cars, homes, securities, and practically anything else. Yet, in Ohio, the parties to those contracts cannot now agree to arbitrate their disputes.

The three dissenting justices recognized that the decision below was not limited in any way to the facts of this case, but rather could lead to "the *wholesale invalidation* of arbitration clauses in consumer transactions." Pet. App. 27a (emphasis added); *see also id.* at 24a (decision below "could potentially invalidate a large percentage of arbitration agreements in consumer contracts"). That is because the court's decision eliminates the federally mandated presumption of arbitrability for all similar contracts.

Respondent seizes on two snippets from the decision below in support of her contention that the court's refusal to enforce the contractual arbitration provision is limited to the

facts of this case. First, as she points out, the court stated that "'any presumption in favor of arbitration was overcome *based on the entire record in this case*,'" Opp. 10 (quoting Pet. App. 13a) (emphasis added by respondent). But the fact that the appellate court *based* its decision on the entire record (as, of course, it was required to do) says nothing about whether the court's decision is in any way *limited* to the facts of this particular case. It is not.

The court below also stated that "[t]he record in this case clearly would support a finding that the arbitration clause violated principles of equity, *given all of the attendant facts and circumstances*." Pet. App. 11a (quoted in part, with emphasis added, at Opp. 12). But the *only* record evidence relating to the arbitration agreement identified by the court below, other than the "form" nature of the contract itself, was an affidavit submitted by respondent in the trial court. *See id.* That affidavit stated only that ITT representatives never pointed out the arbitration clause to her. *See* App., *infra*, 1a. By the same token, however, "[t]here is no evidence in the record that the arbitration clause was concealed [from] or misrepresented to [respondent]." Pet. App. 25a (dissenting opinion). Indeed, respondent's affidavit does not even state that she was unaware of the arbitration provision.

In other words, the "facts and circumstances" of this case simply established that (a) the arbitration clause was contained in a "form" consumer credit agreement and (b) respondent averred, after commencing litigation, that the clause was not brought to her attention by the other party to the contract. Those same facts and circumstances will be present in most, if not all, cases involving the enforceability of arbitration clauses in mortgage loan agreements and similar contracts. Indeed, respondent has not identified a single consumer credit agreement that would *not* be governed by the decision below. The decision below, therefore, can hardly be labeled factbound.

Given the procedural posture of this case, it is unsurprising that the decision below is *not* fact-specific. That is because the court decided, *as a matter of law*, that the arbitration clause was not enforceable. "[N]owhere in the record did the trial court make a specific determination that the arbitration clause was unenforceable." Pet. App. 11a. Indeed, the trial court had *denied* ITT's request for an evidentiary hearing on the arbitrability of this dispute. Moreover, the Ohio Supreme Court held that the reasons given by the trial court and the court of appeals for refusing to enforce the arbitration agreement were legally erroneous. *Id.* The court went on, however, to determine for itself that the arbitration provision was unenforceable. In doing so, the court adopted a *per se* rule declaring unenforceable arbitration clauses in consumer credit agreements.

Respondent recognizes, as she must, that the FAA establishes a presumption of arbitrability. Opp. 11. The court below, however, abandoned that presumption "in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature." Pet. App. 13a. The *only* "indication" of the contract's purported adhesiveness is the fact that it was "on preprinted forms." *Id.*; *see also id.* at 25a (dissenting opinion) (noting that, in Ohio, a contract of adhesion is "a [s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis") (quotations omitted). Contracts of adhesion are not unenforceable in Ohio (or anywhere else); the decision below thus improperly singles out arbitration provisions contained in such contracts for unfavorable treatment. *See Doctor's Associates*, 517 U.S. at 687 ("Congress precluded States from singling out arbitration provisions for suspect status"). That determination applies to virtually all contracts in Ohio (and elsewhere if followed) and, thus, warrants this Court's attention.

b. Respondent asserts that the decision below "is not in conflict with the decisions of other courts." Opp. 13. But

respondent does not even cite, much less attempt to distinguish, explain, or reconcile, *any* of the dozens of cases identified by ITT that directly conflict with the decision below. *See* Pet. 9-14. Rather, respondent strings together a hodgepodge of cases—mostly unpublished district court decisions—that she claims are *consistent* with the decision below. *See* Opp. 13-14.

These cases, however, are either largely irrelevant to the issues in this case, *see, e.g., Waters v. Min Ltd.*, 587 N.E.2d 231, 233 (Mass. 1992) (a nonarbitration case involving a man who swindled his drug-addicted girlfriend), or serve only to highlight the conflict and disarray among the lower courts on the issues identified in the petition. Thus, if anything, respondent's discussion further demonstrates that this Court's review is warranted to ensure that the lower courts do not use state-law unconscionability principles as a cover for the antiquated hostility towards arbitration that Congress enacted the FAA to combat, as the court below did.

c. Finally, respondent contends that the federal question was not preserved because "[t]here is no evidence in the record to establish . . . that the contract in question substantially affected interstate commerce." Opp. 15. That argument, which is nothing other than a newly concocted attempt to stave off review of the deeply flawed decision below, is frivolous.

Respondent's assertion that "in the proceedings below, neither the courts nor the parties addressed the issue of whether the Federal Arbitration Act was applicable" (Opp. 15) is false. Throughout the state-court proceedings, ITT contended that the Federal Arbitration Act mandated enforcement of the contractual arbitration provision. In its opening brief in the Ohio Supreme Court, for example, ITT explained (at 28-29):

> The Federal Arbitration Act governs transactions in interstate commerce such as the contract at issue in this case. . . . The arbitration provision in the contract between [respondent] and ITT specifically states that it is

> in interstate commerce and subject to the Federal Arbitration Act. Therefore, it should be enforced pursuant to its terms and according to judicial decisions under the Act.

Respondent, by contrast, *never* argued below that the federal statute did not apply. She cannot raise that argument for the first time in this Court. *See, e.g., Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990).

Respondent's assertion that "[t]here is nothing on the face of the loan contracts that indicates an effect on interstate commerce" (Opp. 16) is equally wrong. On its face, the contract states, in no uncertain terms, that the parties "agree that the transactions between [them] *are in interstate commerce* and this agreement shall be subject to 9 U.S.C. § 1-14." *See* Pet. App. 26a (emphasis added). Respondent contracted to borrow money from a large, multinational corporation. There can be no question but that the federal commerce power reaches moneylending activities, even where particular transactions appear to be wholly intrastate. *See, e.g., Perez* v. *United States*, 402 U.S. 146 (1971). And, as respondent has to concede, the Arbitration Act extends to the limits of the commerce power. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273-75 (1995). Thus, the federal statute applies to the contract in this case (as the contract itself recites).

It is, accordingly, not surprising that the Ohio Supreme Court clearly considered itself bound by this Court's decisions construing the Federal Arbitration Act. *See* Pet. App. 10a-11a; *id.* at 24a (dissenting opinion) (policy favoring arbitration "is stated in federal arbitration laws, which were specifically incorporated into the contract between [respondent] and ITT by reference"). Because the Ohio Supreme Court applied the federal statute, the federal question is preserved for this Court's review. *Cf. United States* v. *Williams*, 504 U.S. 36, 40-41 (1992).

2. Respondent cavalierly attempts to dismiss the import of this Court's landmark decision in *BMW* v. *Gore*, 517 U.S. 559 (1996), by arguing that ITT's conduct in making a loan to respondent was "reprehensible." Opp. 17. She, like the court below, ignores this Court's holding in *BMW* that the mere fact that "conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[,] does not establish the high degree of culpability that warrants a substantial punitive damages award." 517 U.S. at 580.

Even more tellingly, respondent (again like the court below) *disregards entirely* the other two *BMW* guideposts. Respondent's failure even to attempt to justify the gross disparity between the punitive and compensatory damages or the disproportionality of the punishment in this case as compared to other available sanctions is an implicit concession that the award cannot be defended on those grounds. As explained in the petition (at 24-27), the decision affirming the award in this case conflicts with this Court's decision in *BMW* and with the decisions of many other courts, and, therefore, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 16, 1999

APPENDIX

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

Mildred Williams, first being duly cautioned and sworn, deposes and says that:

1. She does not recall that the arbitration provisions set forth in the agreements she signed with ITT Financial Services were ever mentioned or described to her by any ITT Financial Services representative.

2. When she received telephone calls from ITT representatives asking for payment of the ITT loan amounts, none of them mentioned the arbitration provisions to her.

FURTHER AFFIANT SAYETH NAUGHT.

/s/
MILDRED WILLIAMS

Signed to and sworn before me this 18th day of June, 1990.

/s/ [illegible]
Notary Public

[Seal]